

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UGOCHUKWU GOODLUCK
NWAUZOR, FERNANDO AGUIRRE-
URBINA, individually and on behalf of all
those similarly situated,

Plaintiffs,

v.

THE GEO GROUP, INC., a Florida
corporation,

Defendant.¹

Case No: 3:17-cv-05769-RJB

**GEO'S MOTION TO DISMISS PLAINTIFFS'
FIRST AMENDED COMPLAINT**

NOTE ON MOTION CALENDAR:
July 20, 2018

ORAL ARGUMENT REQUESTED

¹ Filed under a new caption per ECF Docket Nos. 83 and 84.

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1 The Department of Homeland Security and U.S. Immigration and Customs Enforcement
2 (DHS/ICE), by policy and contract, require that The GEO Group (GEO) administer the
3 Voluntary Work Program (VWP) at Northwest Detention Center (NWDC). DHS/ICE validly
4 conferred the authority on GEO to administer the VWP that pays detainees \$1 per day to
5 participate. The First Amended Complaint contains no allegations that GEO acted without ICE's
6 authorization for the \$1 per day rate. Nor do Plaintiffs allege that DHS/ICE lacked a statutory
7 basis to validly confer authority to GEO to administer the VWP at the \$1 per day rate. When a
8 federal contractor acts in a manner that is authorized by the federal agency with which it
9 contracts, and the federal agency validly conferred the authority, the contractor holds derivative
10 sovereign immunity from suit. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21-22 (1940);
11 *see also Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672-73 (2016); *Cunningham v. Gen.*
12 *Dynamics Info. Tech., Inc.*, 888 F.3d 640, 643 (4th Cir. 2018). Therefore, this suit should be
13 dismissed either for lack of subject matter jurisdiction because GEO has *Yearsley* immunity, or
14 alternatively for failure to state a claim that survives the *Yearsley* doctrine.

15
16 Plaintiffs' amended complaint also suffers from the problems already identified by GEO.
17 First, the state minimum wage claim is preempted by federal immigration law. Federal law
18 prohibits this Court from recognizing the employment relationship between GEO and detainees
19 that the Plaintiffs allege, and Congress has kept for itself the issue of detainee payment. Second,
20 Washington's Minimum Wage Act (MWA) does not apply to voluntary institutional
21 maintenance by non-citizens detained in federal facilities. Plaintiffs ask this Court not only to
22 ignore every case holding that similar parties are not employees under the Fair Labor Standards
23 Act (FLSA), but also to turn a blind eye to the State of Washington's own practices in exempting

prisoners and detainees. Third, the case should be dismissed because Plaintiffs have not named ICE as a party. ICE is a required party because this suit is fundamentally based on the Plaintiffs' interpretation of the contract between ICE and GEO for operation of NWDC. Plaintiffs ask the Court to interpret the contract in a manner that departs from ICE's own understanding of its statutory authorities (which is entitled to deference), and to ICE's and GEO's understanding of the relevant law. Because ICE cannot be joined, equity and good conscience warrant dismissal.

This case uses state law to attack federal law and a federal agency's policies that govern the care of federal immigration detainees in federal custody, and federal agencies' partnerships with contractors. And it does so by unfairly threatening a contractor with damages for carrying out lawful, national standards and policies that rest on decades of settled law. The Court should recognize that ICE detainees have no minimum wage rights while detained and dismiss this case.

BACKGROUND

Pursuant to federal statute, DHS/ICE operate immigration detention facilities that house aliens while they await either removal from the United States or decisions on their immigration proceedings. 8 U.S.C. §§ 1103, 1225, 1226, 1231. DHS/ICE operates many of its own Service Processing Centers (SPCs). DHS/ICE also contracts with companies for detention facility services as Contract Detention Facilities (CDF) and with state and local governments for services at publicly-owned facilities via Intergovernmental Service Agreements (IGSAs). All facilities are subject to the same DHS/ICE policies, including the Performance-Based National Detention Standards 2011 (PBNDS) (www.ice.gov/detention-standards/2011).

Section 5.8 of the 2011 PBNDS requires ICE facilities—whether operated by ICE or by contractors—to make the VWP available to detainees and sets rules for its administration.

PBNDS 5.8 specifies that “compensation is at least \$1.00 (USD) per day.” PBNDS § 5.8.V.K. ICE requires GEO to “manage a detainee work program” in accordance with the PBNDS. ICE-GEO Contract, ECF 19 at 82 (“Detainee labor...will adhere to the ICE PBNDS on Voluntary Work Program”). “The detainee work plan must be voluntary, and may include work or program assignments for industrial, maintenance, custodial, service or other jobs.” *Id.* The ICE-GEO contract provides: “Detainee Volunteer Wages for the Detainee Work Program. Reimbursement for this line item will be at the actual cost of \$1.00 per day per detainee. Contractor shall not exceed the amount shown without prior approval by the Contracting Officer.” *Id.* at 5.

Plaintiffs allege that detainees at NWDC are “employees” and GEO is their “employer” for purposes of the MWA. Plaintiffs seek to represent a class of current and former detainees who challenge GEO’s alleged “practice of paying subminimum wages to Plaintiffs and the proposed class members” as violating the MWA. First Am. Class Action Compl. (“FAC”), ECF 84, ¶ 6.3. Plaintiffs seek damages for lost wages for themselves and a class of “all civil immigration detainees who perform or have performed work for GEO at NWDC at any time during the three years prior to the filing of the initial complaint and thereafter.” *Id.* at ¶ 5.1. Plaintiffs do not seek injunctive or declaratory relief relating to DHS/ICE’s policies in the PBNDS or underlying federal law; they seek only damages from GEO as DHS/ICE’s contractor. *Id.* at § VII (Prayer for relief). Plaintiffs do not allege that GEO exceeded its authorization from DHS/ICE. Nor do they allege that DHS/ICE lacked authority to validly confer on GEO the authority to administer the VWP at \$1 per day rates to participate.

STANDARDS OF REVIEW

A motion to dismiss under Federal Rule 12(b)(6) “tests the legal sufficiency of a claim.”

1 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “To survive a motion to dismiss, a
2 complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is
3 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted); *Villa v.*
4 *Maricopa Cty.*, 865 F.3d 1224 (9th Cir. 2017). A claim is facially plausible if the plaintiff has
5 pled “factual content that allows the court to draw the reasonable inference that the defendant is
6 liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citation omitted). In making this
7 assessment, the Court accepts all facts alleged in the complaint as true, and makes all inferences
8 in the light most favorable to the plaintiff. *Barker v. Riverside Cty. Office of Educ.*, 584 F.3d
9 821, 824 (9th Cir. 2009). The Court is not, however, bound to accept the plaintiff’s legal
10 conclusions, and a plaintiff must provide more than “labels and conclusions” or a “formulaic
11 recitation of the elements of a cause of action.” *Id.* Courts do not “accept as true allegations that
12 are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*
13 *Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Federal preemption can support a
14 motion to dismiss. *Cleghorn v. Blue Shield of California*, 408 F.3d 1222, 1227 (9th Cir. 2005).

15
16
17
18 A party may move for judgment on the pleadings, applying the same standards as Rule
19 12(b)(6), “[a]fter the pleadings are closed—but early enough not to delay the trial.” Fed. R. Civ.
20 P. 12(c). Under Rule 12(c), a district court “may also take judicial notice of matters of public
21 record” without converting the motion into one for summary judgment. *United States v. Wood*,
22 925 F.2d 1580, 1582 (7th Cir. 1991).

23
24 *Yearsley* immunity is jurisdictional and thus properly raised under Federal of Civil
25 Procedure 12(b)(1). *Cunningham*, 888 F.3d at 650; *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d
26 326, 344-46 (4th Cir. 2014); *see also F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (“Sovereign
27

immunity is jurisdictional in nature.”). Alternatively, GEO moves to dismiss under Rule 12(b)(6) and/or Rule 12(c) for failure to state a claim for which relief may be granted.

ARGUMENT

I. GEO IS IMMUNE FROM SUIT UNDER *YEARSLEY*.

“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.” *United States v. Mitchell*, 463 U.S. 206, 212 (1983). The United States is immune from suit unless a statute says otherwise. *Campbell-Ewald*, 136 S. Ct. at 672. Through derivative sovereign immunity, agents of the sovereign may also be protected from liability for carrying out the sovereign’s will. *Yearsley*, 309 U.S. at 20-21; *In re KBR, Inc.*, 744 F.3d at 341–43 (reading *Yearsley* to mean that private employees should receive immunity from suit when they perform the same functions as government employees). This immunity derives from “the government’s unquestioned need to delegate governmental functions,” and the acknowledgement that “[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work.” *Butters v. Vance Int’l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000). “[G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.” *Campbell-Ewald*, 136 S. Ct. at 672 (quotation omitted).

In *Yearsley*, a landowner asserted a claim for damages when part of his land was washed out after a private contractor built dikes on the Missouri River under its contract with the federal government. The Supreme Court held that the contractor was not answerable to the landowner, because “the work which the contractor had done in the river bed was all authorized and directed

1 by the Government of the United States” and “performed pursuant to the Act of Congress.” 309
2 U.S. at 20. Where the federal government’s “authority to carry out the project was validly
3 conferred, that is, if what was done was within the constitutional power of Congress,” the Court
4 explained, “there is no liability on the part of the contractor” who performed as the government
5 directed. *Id.* at 20-21. The Court contrasted *Yearsley* to cases where a government agent had
6 “exceeded his authority” or the authority “was not validly conferred.” *Id.* at 21.

8 More recently in *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), the Ninth
9 Circuit held that *Yearsley* immunity did not apply when a company that contracted with the Navy
10 was sued for violations of the Telephone Consumer Protection Act (TCPA). The Ninth Circuit
11 described *Yearsley* immunity as “a narrow rule regarding claims arising out of property damage
12 caused by public works projects.” *Id.* at 879. But on appeal the Supreme Court expressly
13 disagreed, noting that what was “[c]ritical in *Yearsley* was not the involvement of public works,
14 but the contractor’s performance in compliance with all federal directions.” *Campbell-Ewald*,
15 136 S. Ct. at 673 & n.7. The key is that “[q]ualified immunity reduces the risk that contractors
16 will shy away from government work.” *Id.* at 673.

19 *Yearsley* immunity applies to GEO as a contractor providing services to the federal
20 government. “[A] government contractor is not subject to suit if (1) the government authorized
21 the contractor’s actions and (2) the government ‘validly conferred’ that authorization.”
22 *Cunningham*, 888 F.3d at 646 (citing *In re KBR*, 744 F.3d at 342; *Yearsley*, 309 U.S. at 20-21).
23 Both of these elements are met here, and GEO has immunity from Plaintiffs’ claim.²

27 ² GEO answered and conditionally counterclaimed after filing this motion to preserve all defenses without prejudice
28 to a favorable ruling on this motion to dismiss, which would moot its counterclaims and defenses.

1 **A. ICE Authorized GEO’s Administration Of The VWP.**

2 Recent case law shows that GEO meets the first prong of the *Yearsley* test. The Fourth
3 Circuit applied this test in April—post-dating GEO’s motion to dismiss the original complaint—
4 to dismiss a claim against a federal contractor. In *Cunningham*, defendant General Dynamics
5 Information Technology (GDIT) was held to have derivative sovereign immunity based on its
6 contractual work for the U.S. Department of Health and Human Services, Centers for Medicare
7 & Medicaid Services (CMS). 888 F.3d at 643. The Affordable Care Act (ACA) directed CMS
8 to establish a system to keep applicants informed about their eligibility for enrollment in a
9 qualified health plan. *Id.* at 643-44 (citing 42 U.S.C. § 18083). To do so, CMS contracted with
10 GDIT to operate a call center supporting CMS programs. *Id.* at 644. Under the contract, GDIT
11 was required to calls people to tell them they could buy health insurance through the ACA’s
12 exchanges. *Id.* CMS authorized GDIT to use an autodialer to make the calls, provided a script
13 for each call, and provided a list of phone numbers to call. *Id.* The contract also required GDIT
14 “maintain a corporate compliance program” that included “[a]n internal monitoring and auditing
15 function to help ensure compliance with statutes [and] regulations,” and “[a]n enforcement and
16 disciplinary process to address violations of applicable statutes [and] regulations” *Id.*

17
18 CMS sent GDIT millions of telephone numbers and directed GDIT to call some of them,
19 including plaintiff Cunningham’s. *Id.* GDIT called Cunningham and left a message containing
20 CMS’s script. *Id.* Cunningham alleged that he received the phone call without having given his
21 prior consent, in violation of the TCPA, *see* 47 U.S.C. § 227(b)(1)(A)(3), and brought a putative
22 class action on behalf of all persons who received calls under the CMS program. *Id.* GDIT
23 sought to dismiss the case for lack of subject matter jurisdiction under *Yearsley*. *Id.*

1 The Fourth Circuit concluded that the United States and its agencies had immunity from
2 suit under the statute. *Id.* at 645 (citing *Campbell-Ewald*, 136 S.Ct. at 672). Consequently,
3 GDIT “would also be immune from liability for making this phone call if derivative sovereign
4 immunity applies.” *Id.* The Fourth Circuit held that GDIT was entitled to such immunity. *Id.* at
5 646-48. The ACA directed CMS to establish a system to keep applicants informed about their
6 eligibility for enrollment in a qualified health plan. CMS contracted with GDIT to do this. CMS
7 provided GDIT with the phone numbers and permitted the use of an autodialer. The autodialer
8 called Cunningham and left a voicemail with the exact script CMS had provided to GDIT.
9 Therefore, “[q]uite plainly, GDIT performed exactly as CMS directed.” *Id.* at 647.

12 Importantly, Cunningham argued that a provision of the CMS-GDIT contract required
13 GDIT “to follow applicable laws, and that by failing to independently obtain prior consent from
14 each name on the list provided by CMS to ensure compliance with the TCPA,” such that GDIT
15 “violated the contract, requiring this Court to find that CMS did not authorize GDIT’s actions.”
16 *Id.* at 647-48. The Fourth Circuit found this argument “unavailing”: because GDIT “adhered to
17 the terms of its contract with CMS,” the court “conclude[d] that the government authorized
18 GDIT’s actions, satisfying step one of the *Yearsley* analysis.” *Id.*

21 So too here. GEO implements and administers the VWP as authorized and directed by
22 ICE’s contractual requirements. The ICE-GEO contract specifically requires the VWP. ICE-
23 GEO Contract, 82. PBNDS 5.8 makes the VWP an “expected outcome” and “expected practice”
24 under the contract, and PBNDS 5.8.V.K specifically states that the facility operator—whether at
25 ICE’s own SPC facilities or contracted CDF and IGSA facilities—shall pay “at least \$1 per day,”
26 thereby authorizing the payment of \$1 per day per detainee. ICE requires that every VWP

1 participant sign a form prior to working in the VWP, and that form acknowledges that the
2 detainee volunteers to work for \$1 per day. 2014 ICE Detainee Handbook, ECF 61, Exh. B, 17.
3 During the period for which Plaintiffs seek to certify a class, ICE's National Detainee Handbook
4 unambiguously told all detainees in their facilities that "compensation will be \$1 per day." *Id.*
5 Thus, GEO is authorized to administer the VWP at \$1 per day rates per detainee participant.

7 The ICE-GEO Contract confirms this authorization by setting the reimbursement rate for
8 VWP pay to detainees at \$1 per day. ICE-GEO Contract, 5. The contract expressly provides
9 that GEO "shall not exceed" the rate of \$1 per day without the approval of ICE's Contracting
10 Officer. *Id.* By crediting detainees \$1 per day per detainee, therefore, GEO does exactly what
11 ICE authorizes. Indeed, in the State of Washington's case against GEO, this Court recognized a
12 causal nexus between ICE's reimbursement rate and the payment of \$1 per day:
13

14 The Court finds that the causal nexus is satisfied at this stage of the case, under the
15 theory that GEO pays detainees \$1 per day based on a rate compensated by the
16 Government. Under this theory, GEO's compensation rate is an "action under" a
17 federal officer ***because it is taken pursuant to the ICE-GEO Contract, and GEO
compensates detainees at that rate because of GEO's contract with ICE.***

18 Order at 4, *State of Washington v. The GEO Group, Inc.*, No. 3:17-cv-05806-RJB (W.D. Wash.
19 Dec. 13, 2017) (emphasis added). The Court correctly recognized that GEO adopts the \$1 per
20 day rate "because" of GEO's contract with ICE.
21

22 Notably, the FAC contains ***no*** allegation that GEO acts outside of ICE's authorization
23 when it administers the VWP, or that it failed to follow ICE's directions. Thus, even drawing all
24 inferences in favor of the plaintiffs, the complaint fails to allege that VWP payments are made
25 without ICE's authorization. Paragraph 4.3 alleges that "GEO's contract with ICE requires GEO
26 to comply with state and local laws," but this is inaccurate. The ICE-GEO contract provides that
27

1 “[t]he detainee work program shall not conflict with any other requirements of the contract and
2 must comply with all **applicable** laws and regulations.” ICE-GEO Contract, 82 (emphasis
3 added). While Plaintiffs claim (and GEO disputes) that Washington minimum wage law applies,
4 Plaintiffs do not, and cannot, allege that GEO exceeds **ICE**’s delegated authority by the \$1 per
5 day rate. The \$1 per day amount is expressly authorized by PBNDS 5.8.V.K, and is exactly the
6 amount reimbursed under the ICE-GEO Contract. Indeed, DHS audited GEO’s compliance with
7 compensation provision of PBNDS 5.8 and concluded that GEO complied with its policy
8 **because** detainees receive monetary compensation for work performed through a \$1.00 daily
9 stipend. Under DHS quality controls, GEO could be fined for not upholding PBNDS 5.8’s
10 requirements. ICE-GEO Contract, A-1. Even assuming the \$1 daily rate is a floor rate, it is a
11 rate that conforms to ICE policy, which is uniform across the Nation. No state jurisdictions pay
12 minimum wage to detainees workers, including Washington, and Plaintiffs had no reasonable
13 expectation that GEO would pay minimum wage without ICE’s authorization.

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17 GEO acts within DHS/ICE’s authorization by administering the VWP at the \$1 per day
18 per detainee rate for VWP participation, satisfying *Yearsley*’s first element.

19
20 **B. ICE Validly Conferred The Authority To GEO To Administer The VWP.**

21 GEO also meets the second prong of the *Yearsley* test. Government authorization is
22 “validly conferred” if Congress had the power to grant authorization, and then Congress
23 “authorized the government agency to perform a task and empowered the agency to delegate that
24 task to the contractor.” *Cunningham*, 888 F.3d at 646-647; *see also In re KBR*, 744 F.3d at 342;
25 *Yearsley*, 309 U.S. at 20-21. **Nothing** in the FAC alleges that DHS/ICE lacks Congressional
26 authorization to operate the VWP or that DHS/ICE did not validly delegate that task to GEO.

1 Therefore, on the face of the FAC, GEO satisfies *Yearsley*'s second element.

2 It is clear that ICE has the authority to require GEO to administer the VWP in contract
3 facilities and to reimburse GEO for an amount of \$1 per day per detainee. The Secretary of
4 Homeland Security and Attorney General have broad authority, delegated in many instances to
5 ICE, to create policy to govern immigration generally, and specifically to spend money to
6 operate detention facilities. *See, e.g.*, 8 U.S.C. § 1103(a)(3) (Secretary "shall establish such
7 regulations ... and perform such other acts as [she] deems necessary for carrying out [her]
8 authority under the provisions of this chapter"); 8 U.S.C. § 1231(g) ("The Attorney General shall
9 arrange for appropriate places of detention for aliens detained pending removal or a decision on
10 removal...the Attorney General may expend from the appropriation "Immigration and
11 Naturalization Service—Salaries and Expenses"...amounts necessary to...operate
12 facilities...necessary for detention."). Congress has assumed congressional oversight over the
13 conditions of detention, including the VWP, by mandating training on PBNDS standards and
14 compelling timely implementation of updated standards. *See ICE, Progress in Implementing*
15 *2011 PBNDS Standards, Fiscal Year 2016 Report*, at 1 (2017). The PBNDS were written in
16 collaboration with the American Bar Association (ABA) and immigrant advocacy groups to
17 provide uniform standards to govern all types of detention facilities. *Id.* at 2-3; DHS, Office of
18 Inspector Gen., *Treatment of Immigration Detainees*, at 2 (OIG-07-01) (Dec. 2006). Further,
19 Congress has specifically authorized the appropriation of money for an "allowance" to detainees
20 for work performed while in detention. 8 U.S.C. § 1555(d). Subsequent Congressional bills
21 until 1979 appropriated an amount "not in excess" of \$1 per day. *See, e.g.*, Dep't of Justice
22 Appropriation Act, 1979, Pub. L. No. 95-431, 92 Stat. 1021, 1027 (Oct. 10, 1978).

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1 In the view of courts and INS's General Counsel—more than a decade after Congress
2 ceased to expressly appropriate funds—8 U.S.C. § 1555(d) continues to authorize the \$1 daily
3 allowance. INS General Counsel, *Your CO 243-C Memorandum of November 15, 1991; DOD*
4 *Request for Alien Labor*, General Counsel Op. No. 92-63, 1992 WL 1369402 (Nov. 13, 1992)
5 (noting that discontinuance of annual appropriation of \$1 daily allowance “does not abrogate
6 [agency] authority to pay aliens for labor performed while in [agency] custody” and “the
7 [agency] retains authority to expend appropriated funds to pay aliens for labor performed while
8 in custody”); *see also* INS General Counsel, *The Applicability of Employer Sanctions to Alien*
9 *Detainees Performing Work in INS Detention Facilities*, General Counsel Op. No. 92-8, 1992
10 WL 1369347 (Feb. 26, 1992) (noting that at ICE and contract facilities, “[t]he allowance paid to
11 a detainee for work performed is specifically provided for by 8 U.S.C. § 1555(d) and currently
12 limited by Congress to \$1 per day”); *Guevara v. I.N.S.*, 954 F.2d 733, 1992 WL 1029, *2 (Fed.
13 Cir. Jan. 6, 1992) (“Congress provided that under certain circumstances aliens who are lawfully
14 detained pending disposition may be paid for their volunteer labor. The wage level is a matter of
15 legislative discretion.”). Furthermore, the INS General Counsel concluded that detainees are not
16 “employees” because “[a] detainee performs work for institution maintenance, not
17 compensation.” *Applicability of Employer Sanctions*, 1992 WL 1369347, at *1.

18 These opinions regarding the federal agency's understanding of its own statutory
19 authority and delegated power warrant the Court's deference. *Udall v. Tallman*, 380 U.S. 1, 16
20 (1965) (“When faced with a problem of statutory construction, this Court shows great deference
21 to the interpretation given the statute by the officers or agency charged with its administration.”);
22 *NCNB Texas National Bank v. Cowden*, 895 F.2d 1488, 1494 (5th Cir. 1990) (“[S]ubstantial

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1 deference to an agency’s determination of its authority may be appropriate.”). The agency
2 opinions unequivocally state that valid authority to pay \$1 per day for detainee work comes from
3 Congress, and that detainees are not “employees” of ICE’s detention facilities, public or private.
4

5 That is where the inquiry should end. Critically, the “validity” element of the second
6 prong of the *Yearsley* test does **not** involve delving into the merits of the plaintiff’s claim that
7 state law requires a minimum wage. The only issue is whether DHS/ICE has authority to validly
8 confer on GEO the power to administer the VWP that pays \$1 per day. In *Cunningham*, the
9 Fourth Circuit held that GDIT satisfied this second prong because it was undisputed that GDIT
10 made the call to the plaintiff “pursuant to CMS’s statutory mandate to administer the ACA and
11 keep applicants informed about their eligibility for enrollment in a qualified health plan.” 888
12 F.3d at 648. Nonetheless, *Cunningham* argued that the government cannot “validly confer” the
13 authority “to engage in conduct that violates the law,” and that CMS could not validly confer
14 authority to GDIT that violated the TCPA. But the Fourth Circuit held that this interpretation
15 “misinterprets the scope of *Yearsley*’s second step” because “[t]he question is not whether
16 informing applicants of their enrollment eligibility violated the law, but rather whether Congress
17 had the authority to assign GDIT to complete that task.” *Id.* (citing *Yearsley*, 309 U.S. at 20; *In*
18 *re KBR*, 744 F.3d at 342, 344 n.7). Indeed, “[t]he purpose of *Yearsley* immunity is to prevent a
19 government contractor from facing liability for an alleged violation of law, and thus, ***it cannot be***
20 ***that an alleged violation of law per se precludes Yearsley immunity.***” *Id.* at 648-49 (emphasis
21 added). Therefore, the court “reject[ed] *Cunningham*’s overinclusive interpretation of what
22 constitutes a ‘valid conferral’ of authority under this prong.” *Id.* at 649.
23
24
25
26

27 Because ICE validly conferred statutory authority to administer the VWP at a rate of \$1

per day to participating detainees, *Yearsley*'s second element is satisfied. The amended complaint should be dismissed for lack of subject matter jurisdiction over GEO, or, alternatively, dismissed with judgment entered for GEO because GEO cannot be sued under *Yearsley*.

II. THE MINIMUM WAGE CLAIM IS PREEMPTED BY FEDERAL LAW.

In the event the Court does not dismiss on immunity grounds, GEO also seeks dismissal on other grounds. GEO recognizes that the Court has issued prior rulings, but an amended complaint supersedes the original complaint and renders it without legal effect. *Lacey v. Maricopa County*, 693 F.3d 896, 927 (9th Cir. 2012). GEO respectfully requests this Court's fresh consideration of its current arguments regarding preemption by federal law and the inapplicability of Washington's MWL. *See, e.g., Bromfield v. McBurney*, No. C07-5226RBL-KLS, 2008 WL 2746289, at *2 (W.D. Wash. July 8, 2008), *report and recommendation adopted by Bromfield v. McBurney*, 2008 WL 4426827, at *1 (W.D. Wash. Sept. 26, 2008) ("As [plaintiff] has now filed a new, amended complaint, the GEO defendants once again are entitled to challenge the validity thereof under [Rule] 12(b)(6).").

A. The Claim Is Field Preempted.

Field preemption arises whenever Congress, acting within its powers, occupies the field of law that governs a case. *See Arizona v. United States*, 567 U.S. 387, 401-02 (2012); U.S. Const. art. VI, cl. 2. Congress has undoubted power over immigration and has occupied the field of alien employability: aliens cannot be hired by any employer that knows they are illegal. 8 U.S.C. § 1324a(a). This provision, first enacted as part of the Immigration Reform and Control Act ("IRCA"), is "a comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc., v. N.L.R.B.*, 535 U.S. 137, 147 (2002). Under

1 IRCA, all job applicants must prove their work eligibility by offering proper documentation. *See*
2 U.S. Citizenship & Immigration Servs., OMB No. 1615-0047, Employment Eligibility
3 Verification (2018). Indeed, aliens become *inadmissible* to the United States by falsely claiming
4 to be citizens in order to secure jobs, or by misrepresenting any material fact to secure work
5 authorization. 8 U.S.C. § 1182(a)(6)(C). Only aliens who have proper work authorization may
6 be employed, which grants them labor protections such as those created by the FLSA.
7

8 Plaintiffs' claim is subject to field preemption because their theory would allow states to
9 wholly sidestep IRCA by extending labor laws to cover unemployable aliens. Plaintiffs' claim
10 injects Washington's MWA into the federal system by asserting an employer-employee
11 relationship under state law that cannot exist under federal law. As courts have universally
12 recognized, immigration detainees, like inmates and pretrial detainees, are not subject to the
13 FLSA. *See, e.g., Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 396-97 (5th Cir. 1990). Similarly,
14 immigration detention facilities do not violate IRCA when detainees participate in voluntary
15 work programs because such programs are not employment. *Applicability of Employer*
16 *Sanctions*, 1992 WL 1369347, at *2. State law cannot *create* labor benefits that are
17 unrecognized by the FLSA because they are prohibited by IRCA. Holding otherwise would
18 undercut IRCA: it would allow states to authorize alien employment despite Congress's
19 "comprehensive scheme prohibiting the employment of illegal aliens in the United States."
20 *Hoffman Plastic Compounds*, 535 U.S. at 147.
21

22 Indeed, Plaintiffs' claim is still more clearly preempted in the detention context because
23 Congress has addressed this very issue: by enacting 8 U.S.C. § 1555(d), Congress arrogated to
24 itself the question of what "allowance" would be paid to immigration detainees. *DOD Request*
25

1 *for Alien Labor*, 1992 WL 1369402³; *Applicability of Employer Sanctions*, 1992 WL 1369347;
2 *Guevara*, 1992 WL 1029, at *2. Detainees who work in voluntary programs like the one ICE
3 requires GEO to operate at NWDC are paid from funds appropriated by Congress and allocated
4 to ICE, which delegates the administration of the VWP to contractors at CDFs like NWDC.
5 While detainees may feel that \$1 per day is too low, the relevant fact is that under federal law
6 this payment is an “allowance” paid “for work performed;” it is not a competitive wage. 8
7 U.S.C. § 1555(d). FLSA precedents underscore this point. *E.g.*, *Alvarado Guevara*, 902 F.2d at
8 396-97. As discussed, ICE has long relied on that provision to authorize programs, like the
9 VWP, that aim to reduce detainee idleness and reduce operational costs, and has subjected it to
10 specific state laws only. *See* PBNDS, § 5.8, II.1-4; *id.* § 5.8, II.5 (subjecting VWP only to
11 “applicable ... state and local **work safety** laws...”) (emphasis added). But the agency has never
12 concluded that state minimum wage laws apply; it has considered the rate to be set by Congress.
13

14
15
16 Consequently, Plaintiffs seek to use state law to preempt federal law: adopting the
17 Plaintiffs’ interpretation of state labor law will either upend a decades-old Congressional statute
18 regulating immigration detainees or nullify a comprehensive federal ban on employing aliens.
19 Because neither result is constitutional, Plaintiffs’ claim is subject to field preemption.
20

21 **B. The Claim Is Conflict/Obstacle Preempted.**

22 Even when a state law is not subject to express or field preemption, it may still be
23 preempted when it “stands as an obstacle to the accomplishment and execution of the full
24 purposes and objectives of Congress.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363,
25

26
27 ³ As argued above, the INS General Counsel’s opinions that detainee workers are not facility “employees,” and that
28 the pay rate is \$1 per day deserve deference as the interpretation of the statute by those charged with carrying out.

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1 373 (2000). Courts should “examin[e] the federal statute as a whole” and “identify[] its purpose
2 and intended effects” to assess whether state law poses such an obstacle. *Id.*

3 Plaintiffs’ claim should be dismissed because it will plainly—and intentionally—stand as
4 an obstacle to Congress’s purposes. First, through IRCA, Congress enacted a comprehensive
5 prohibition on alien employment. *Hoffman Plastic Compounds*, 535 U.S. at 147. That
6 prohibition prevents GEO from employing any detainee who lacks work authorization, which
7 plainly includes many, if not all, detainees at NWDC. By granting “backpay” to detainees,
8 however, this Court will “trivialize [federal] immigration laws” by extending employment
9 protections to aliens who are unemployable. *See id.* at 150. Importantly, the amended complaint
10 contains *no* allegation that the Plaintiffs were authorized to be GEO’s employees under federal
11 law. Therefore, the Court cannot infer authorization to work for GEO. Compelling GEO to treat
12 detainees as “employees” when federal law forbids it creates a direct conflict. It inverts the
13 relationship between state and federal law by allowing state minimum wage law, rather than
14 IRCA, to determine whether an alien can be an employee.

15 This obstacle becomes still clearer in light of Congress’s creation of an allowance for
16 aliens in precisely this context. Through 8 U.S.C. § 1555(d), Congress unambiguously signaled
17 that detainees that perform work may be paid an “allowance” that *Congress* sets, thereby leaving
18 no role for state laws or federal contractors to set or adjust the rates of pay for work performed
19 by detainees. Section 1555(d) is the building block for the VWP. ICE has understood that its
20 own authority to pay detainees arises from Congress, and, consistent with FLSA precedents and
21 IRCA, that detainee work does not create an employment relationship with a detention facility.
22 *DOD Request for Alien Labor*, 1992 WL 1369402; *Applicability of Employer Sanctions*, 1992

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1 WL 1369347. PBNDS 5.8's policy that "compensation is at least \$1.00 (USD) per day" stems
2 directly from the purposes and objectives of Congress. Further, the ICE-GEO contract expressly
3 provides that GEO "shall not exceed" the rate of \$1 per day without ICE's approval. But
4 Plaintiffs allege that state law alone creates an employment relationship between detainees and
5 facilities, and determines the rate of pay. This imposition of state law will fundamentally alter
6 the VWP: how it functions, what it costs, and whether ICE can continue to use it as an expected
7 practice in its detention facilities. Thus, state law creates an obstacle to the power of the
8 Attorney General, DHS, and ICE—charged by Congress with the operation of federal
9 immigration detention—to obey state law mandates, at the expense of federal law.

12 **III. PLAINTIFFS FAIL TO STATE A WAGE CLAIM.**

13 Even were the MWA not preempted by federal law, it still would not apply to Plaintiffs'
14 claim. The MWA is based on the FLSA. *Anfinson v. FedEx Ground Package Sys., Inc.*, 281
15 P.3d 289, 298 (Wash. 2012). Both statutes include definitions of "employee" and "employ."
16 *Compare* 29 U.S.C. § 203(e)(1) ("[T]he term 'employee' means any individual employed by an
17 employer.") *and* 29 U.S.C. § 203(g) ("'Employ' includes to suffer or permit to work.") *with*
18 Wash. Rev. Code § 49.46.010(3) ("'Employee' includes any individual employed by an
19 employer...") *and* Wash. Rev. Code § 49.46.010(2) ("'Employ' includes to permit to work.").
20 Unsurprisingly, then, the Washington Supreme Court has recognized that the MWA should be
21 interpreted to follow the FLSA unless a party shows some contrary legislative intent. *Anfinson*,
22 281 P.3d at 298. The FLSA does not apply to immigration detainees who perform some work
23 inside a facility. *Alvarado Guevara*, 902 F.2d at 396-97; *see also Menocal v. The GEO Group,*
24 *Inc.*, 113 F. Supp. 3d 1125, 1129 (D. Colo. 2015); *Whyte v. Suffolk Cty. Sheriff's Dep't*, 91 Mass.

1 App. Ct. 1124, 2017 WL 2274618, at *2 (Mass. App. May 24, 2017).

2 By its own terms, the MWA shows that the Washington Legislature did not intend the
3 MWA to apply to federal immigration detainees. Despite its broad definition of “employee,” the
4 MWA excludes not only inmates but also residents and patients of any “state, county, or
5 municipal correctional, detention, treatment or rehabilitative institution” from coverage. Wash.
6 Rev. Code § 49.46.010(3)(k); *see also Menocal*, 113 F. Supp. 3d 1129 (finding state **prison** wage
7 exemption grounds to dismiss Colorado wage claim against GEO). These detainees and other
8 institutional residents are paid for their work only what the state government authorizes. *See*,
9 *e.g.*, Wash. Dep’t of Corrections Policy 700.100. Like the VWP, such programs are not intended
10 to provide a living wage but to help regulate behavior and lower institutional costs. *See id.*

13 In light of these policies and the underlying statute, the Washington Legislature plainly
14 did not intend for the MWA to extend to federal immigration detainees any more than it intended
15 the MWA to cover other institutional residents. The Legislature’s failure to explicitly exempt
16 federal immigration detainees from the MWA—whether detained in a facility operated by ICE or
17 a contractor—indicates nothing but the state’s recognition of the federal government’s power to
18 set standards for detention and related expenditures. And as the Seventh Circuit recognized in
19 confronting a similar claim under the FLSA, Congress’s decision not to create an “express
20 exception for prisoners” in the FLSA was likely no decision at all: no exception was included
21 probably because “the idea was too outlandish to occur to anyone when the legislation was under
22 consideration by Congress.” *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005). So too here.

25 The Washington Legislature has apparently never considered the VWP to violate the
26 MWA. Plaintiffs do not allege that Washington’s Department of Labor and Industries (“L&I”),
27

1 the state agency tasked with enforcing the MWA, has ever sought to enforce the MWA against
2 GEO or ICE with respect to the VWP at any time. Nor do they allege (and GEO is unaware of)
3 any investigations, complaints, or any other actions of any kind that L&I has taken with respect
4 to Plaintiffs' claim or any similar one. There is no evidence that the Washington Legislature or
5 L&I considers the MWA to reach beyond the FLSA in this context. Any extension of the law to
6 federal detainees held by government contractors must come from the Washington Legislature,
7 not this Court.
8

9
10 **IV. THE CASE SHOULD BE DISMISSED FOR FAILURE TO JOIN THE**
11 **PROPER FEDERAL AGENCIES.**

12 If a person required to be joined under Rule 19(a) is absent, the Court must order the
13 plaintiff to join the absent party. Fed. R. Civ. P. 19(a)(2). Here, joinder is not feasible due to the
14 Federal Government's sovereign immunity, and the case cannot continue in equity and good
15 conscience. Fed. R. Civ. P. 19(b). The Court is familiar with the factors. Fed. R. Civ. P.
16 19(b)(1)-(4); *Dawavendewa v. Salt River Proj. Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1161-63
17 (9th Cir. 2002).
18

19 However, Rule 19 also requires a burden shifting approach, which the Court did not
20 properly apply in its prior ruling on joinder. A movant must make a *prima facie* showing that an
21 absent party is required to be joined. *Boles v. Greeneville Hous. Auth.*, 468 F.2d 476, 478 (6th
22 Cir. 1972); *United States v. Sweeny*, 418 F. Supp. 2d 492, 499 (S.D.N.Y. 2006); *see also* 7
23 Wright & Miller, Fed. Prac. & Proc. § 1609. If the movant makes a sufficient showing, the
24 nonmovant bears the burden to negate it. *Boles*, 468 F.2d at 478. If the nonmovant does not, the
25 court should either dismiss the case or, if possible, order the plaintiff to amend its claim to join
26
27

1 the absent party. *See id.*

2 **A. Under Ninth Circuit Precedents, The Federal Agencies Are Required**
3 **Defendants.**

4 In *Dawavendewa*, the plaintiff sought to enjoin hiring preferences by a lessee that were
5 allegedly illegal under federal law. 276 F.3d at 1153. The defendant lessee argued that a Native
6 American tribe—the owner of the land and the defendant’s lessor—was required to join the
7 action because the hiring practices underlying the case were required by the defendant’s lease
8 with the tribe. *Id.* at 1153-54. The Ninth Circuit held that the court could not accord complete
9 relief without adding the tribe. *Id.* at 1155-56. The court reasoned that even if the plaintiff won
10 his claim against the defendant lessee, the non-party tribe would not be bound by that judgment.
11 *Id.* at 1155. Thus, the tribe would be free to simply terminate the defendant’s lease and enter a
12 new lease with a new party that again required the hiring terms that the plaintiff claimed were
13 illegal. *Id.* at 1155-56. Because this would undercut the plaintiff’s relief “even if victorious,”
14 the tribe was a required party under Rule 19(a)(1)(A). The Ninth Circuit concluded that it was a
15 “fundamental principle” that “*a party to a contract is necessary, and if not susceptible to*
16 *joinder, indispensable to litigation seeking to decimate that contract.*” *Id.* at 1157 (emphasis
17 added); *see also Wilbur v. Locke*, 423 F.3d 1101, 1113 (9th Cir. 2005), *abrogated on other*
18 *grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); *Mudarri v. State*, 147 Wn.
19 App. 590, 196 P.3d 153 (2008) (attack on contract requires joinder of parties to the contract).

20 A party faces inconsistent obligations when sued for actions taken in performance of a
21 contract and the contractual counterparty is absent. In *EEOC v. Peabody Western Coal Co.*, 610
22 F.3d 1070 (9th Cir. 2010), the EEOC filed a suit against a coal company, claiming that the
23 company engaged in preferential hiring practices that violated federal law. *Id.* at 1074. But

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1 those practices were required under its lease with the Native American nations (“Nation”) that
2 owned the land, and had also been approved by the Department of the Interior (“DOI”). *Id.* at
3 1074-75. The Nation was a required party to the action because a judgment against the coal
4 company in the absence of the Nation would put the company “between the proverbial rock and
5 a hard place—comply with the injunction prohibiting the hiring preference policy or comply
6 with the lease requiring it.” *Id.* at 1078 (quoting *Peabody*, 400 F.3d 774; *Dawavendewa*, 276
7 F.3d at 1156). The DOI was also deemed a required party under Rule 19—even though not a
8 party to the lease—because the provision had been added to the lease at its direction. *Id.* at
9 1080-82.

12 The Ninth Circuit has also found a federal agency to be a required party when a plaintiff
13 sues a defendant for conduct in accord with the absent agency’s policies. In *McCowen v.*
14 *Jamieson*, 724 F.2d 1421 (9th Cir. 1984), a state agency was sued to enjoin certain practices
15 relating to its distribution of food stamps. *Id.* at 1422. The Ninth Circuit held that the federal
16 agency was a required party because the state agency had been merely “following the direction
17 of the [federal agency] in applying a modification of the administrative regulations.” *Id.* at 1424.
18 Because the “thrust of the action [wa]s against the [federal] agency’s interpretation of its own
19 regulations, naming subordinates as defendants in the action d[id] not negate the [federal
20 agency’s] indispensability.” *Id.*

23 These binding authorities make DHS and ICE required parties. As discussed, ICE’s
24 policies—the PBNDS—apply to all federal immigration detention facilities, whether operated by
25 ICE itself or by contractors. Therefore, all facilities, whether run by ICE, GEO, or other
26 contractors, are required to offer the VWP. This lawsuit essentially seeks to rewrite the ICE-

1 GEO contract and the policies that the contracts require GEO to follow. Here, a ruling that VWP
2 participants are GEO's "employees" would place GEO in a clear conflict: there is no way for
3 GEO to simultaneously comply with such an order, its contractual obligations to administer the
4 VWP, and the contractual (and federal statutory) prohibition on hiring illegal aliens. ICE-GEO
5 Contract, 57, 63-66, 82. Further, a judgment that detainees that have been participating in the
6 VWP at a contract facility are "employees" of the facility, that the facility their "employer," and
7 that state minimum wage law controls VWP pay would not bind ICE, but it would increase the
8 cost of offering the VWP far in excess of what DHS/ICE contemplated when it set work policies
9 and entered into contracts for the operation of facilities. Imposing an employment relationship
10 between detainees and GEO would interfere directly with employer-like decisions that ICE
11 reserves for itself. *See, e.g.,* ICE-GEO Contract, ECF 19 at 82 ("It will be ***the sole responsibility***
12 ***of ICE*** to determine whether a detainee will be allowed to perform on voluntary work details and
13 at what classification level") (emphasis added). It would erase a line between detainees and
14 employers that ICE expressly drew in the contract. *Id.* ("Detainees shall not be used to perform
15 the responsibilities or duties of an employee of the Contractor"). It would introduce a state law
16 employment relationship and minimum wage requirement that is antithetical to the agency's own
17 interpretation of its statutory authority that informs the VWP policy and the terms of ICE's
18 contracts for facility management. *See supra* at 11-12, 15-16. ICE is a required party.

23 **B. The Federal Agencies Cannot Be Joined As Defendants.**

24 However, federal agencies are immune from suit unless Congress has specifically
25 authorized suits against them. "It is elementary that the United States, as sovereign, is immune
26 from suit save as it consents to be sued, and the terms of its consent to be sued in any court
27

1 define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538
2 (1980) (alterations omitted). Thus, "[a]bsent a waiver, sovereign immunity shields the Federal
3 Government and its agencies from suit." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260
4 (1999) (quoting *Meyer*, 510 U.S. at 475). Like any other federal agency, ICE is protected by
5 sovereign immunity apart from any express statutory waiver. *See, e.g., Hopper v. John Doe*
6 *Myers Rec. Coach NW Det. Ctr.*, No. C05-5680, 2006 WL 2597915 (W.D. Wash. Sept. 8, 2006)
7 (ICE properly dismissed from suit for damages and injunctive relief on sovereign immunity
8 grounds). A *state* law cannot waive the *federal government's* sovereign immunity.
9

10 **C. Equity And Good Conscience Require That This Case Be Dismissed.**

11 Equity and good conscience require dismissal because judgment for Plaintiffs without
12 ICE's joinder would subject GEO to substantial prejudice. In *Peabody*, the Ninth Circuit held
13 that a plaintiff's money damages claim could not justly proceed without joining the federal
14 agency because the defendant's liability was incurred only by following the agency's policies.
15 The defendant's "only sin, if indeed it was a sin, was to comply with [a contract provision]
16 inserted in its lease at the insistence of [a federal agency]. It would be profoundly unfair for a
17 court to award damages against [defendant] while allowing [defendant] no redress against the
18 government." *Peabody*, 610 F.3d at 1084. So too here: Plaintiffs seeks backpay that GEO was
19 allegedly required to pay for VWP participation, based on a theory that is contrary to ICE and
20 GEO's own understanding of the relevant statutory authority, VWP policies, and their contracts.
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24 **CONCLUSION**

25 The Court should dismiss the First Amended Complaint for lack of subject matter
26 jurisdiction, or dismiss the complaint and enter judgment that Plaintiffs are entitled to no relief.
27

28 NWAUZOR ET AL. v. THE GEO GROUP, INC.
ECF CASE NO. 3-17-cv-05769
GEO'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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CERTIFICATE OF SERVICE

I, Mark Emery, hereby certify as follows:

I am over the age of 18, a resident of Washington, DC, and not a party to the above action. On June 27, 2018, I electronically filed the above GEO's Motion to Dismiss Plaintiffs' First Amended Complaint with the Clerk of the Court using the CM/ECF system and served via Email to the following:

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I certify under penalty of perjury under the laws of Washington that the above information is true and correct.

DATED this 27th day of June, 2018 at Washington, DC.

/s/ Mark Emery

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